United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1567

76-1567

B

P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID BRYANT,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Were the eyewitness identifications by Donna Vickers, Stella Bynoe, and Gwendolyn Walters the result of tainted procedures which created the substantial liklihood of irreparable mis-identification?

   Answer: The lower court held that they were not and refused to suppress these identifications.

2. Was Mr. Bryant's statement taken in violation of his Fifth Amendment rights, his rights under 18 U.S.C. 3501?

   Answer: The lower court held that Mr. Bryant's statement was proper and refused to suppress it.

3. Did the receipt of Mr. Bryant's mug shot, in evidence, deny him due process?

   Answer: The lower court held that it did not and refused to grant a mistrial at the time of its introduction.

4. Was Mr. Bryant denied due process when photographs taken prior to the bank robbery introduced into evidence?

   Answer: The lower court held that he was not denied due process.

5. Was Mr. Bryant denied due process by the failure of the F.B.I. to preserve its raw notes after completing its form 302?

   Answer: The lower court held that he was not.

6. Was Mr. Bryant's sentence excessive?

   Answer: The lower court held that it was not.

F A C T S

On June 20, 1975, at approximately 11:00 A. M., three armed robbers entered a branch of the Lincoln First Bank, in Rochester, New York, and emerged a few minutes later with approximately $29,000.00.

Several hours later, Douglas Quinn, not a co-defendant in this case, was arrested by City of Rochester Police, and taken to the Public Safety Building in Rochester.

He was accused of the robbery and interrogated until 9:30 P. M., a period of some eight hours. After looking at pictures of the robbers, taken by the bank surveillance camera, he identified them as the appellant and two other individuals. Thereafter, Mr. Quinn was released and no formal charges were ever placed against him.

On that same day as a result of that identification, Mr. Bryant was arrested, by Rochester Police Detectives, taken to the Public Safety Building and charged, by them, with armed robbery.

The F.B.I., learning of that arrest, went to the Public Safety Building, and interrogated Mr. Bryant twice on June 20, 1975.

On each of those two separate occasions, Mr. Bryant

stated that he wished to speak with his attorney and thereafter the interviews were terminated. It is undisputed that the F.B.I. Agents never took steps to ascertain whether the defendant had an attorney, made no arrangements for him to speak with one and didn't volunteer to get one for him.

On Monday, June 23, 1975, F.B.I. Agents Foley and Kane interrogated Mr. Bryant. Although they were aware of the fact that Mr. Bryant had indicated that he would make no statement prior to speaking with his attorney, they did not ascertain from him whether he had spoken with his attorney.

The F.B.I. Agents handed him his Miranda rights advice form, which he declined to sign and proceeded to interrogate him at the Monroe County Jail. He was told, in substance, that a warrant was going to be issued for his arrest.

Thereafter, defendant made a statement in which he said that he did not commit the robbery, that he was not there and that he could produce eleven people who would establish that he was some other place.

Although the statement was exculpatory, defendant did not testify and none of these witnesses appeared on his behalf.

At the time that this interrogation was going on, another F.B.I. Agent had signed a complaint in front of the United States Magistrate requesting a warrant for the arrest of Mr. Bryant and the warrant was issued on this same date. Although this warrant was obtained June 23, 1975, Mr. Bryant was not arraigned before the United States Magistrate until July 25, 1975.

Concomitantly, based upon Douglas Quinn's identification, two sisters of Harold Alexander (one of the co-defendants) were separately interviewed. They were shown bank surveillance photographs of their brother, and another defendant. They were also showed photographs of the defendant whom they identified as "Randy Johnson". At that interview, the F.B.I. Agent interviewing them, advised them that in fact it was not Randy Johnson but the defendant.

On June 25, 1975, the Monroe County District Attorney's Office, conducted a preliminary hearing to determine whether there was probable cause to hold

Mr. Bryant for further proceedings. He was brought to the hearing and one of the bank tellers, Ms. Vickers, present at the robbery, took the witness stand to confront him.

At that hearing, her attention was directed to Mr. Bryant, and she then and there stated that she could not identify him as being one of the bank robbers.

Three months later, the Monroe County Grand Jury convened and heard the testimony of Miss Vickers.

Prior to commencing her testimony, she was shown a wallet-size photograph, which she believed was in color, of Mr. Bryant. At that time, she identified Mr. Bryant, in the presence of the Monroe County Grand Jury and the District Attorney as being the person who committed the bank robbery.

Prior to trial, Mr. Bryant moved to suppress the eyewitness identification made by Stella Bynoe, Gwendolyn Walters and Donna Vickers as being suggestive and creating the liklihood of irreparable misidentification. The court refused to suppress this evidence.

Mr. Bryant also moved, unsuccessfully, to suppress a statement on the grounds that he was not taken to the United States Magistrate and that his Fifth Amendment rights were violated.

At the trial, in addition to the above identifications, the United States Government introduced scientific evidence which purported to favorably compare footprints left on the teller's cage at the Lincoln Rochester Trust Company with those of sneakers worn by David Bryant at the time that he was arrested.

Mr. Bryant was arrested six hours after the bank robbery and there was no proof that he wore those shoes prior to his involvement in the robbery, if the eyewitness testimony were out of the case, this proof would not be conclusive.

The eyewitness identification of Ms. Vickers was attacked on the grounds of the incredible and varied descriptions which she had given of the person whom she claimed was the defendant. In order to bolster that in-court identification, the government intro-

duced two photographs of the defendant taken several days before the robbery by some third person for purposes having nothing whatsoever to do with the matters for which Mr. Bryant was arrested.

The government also introduced a mug shot of the defendant, taken the day he was arrested, which portrayed him holding a sign saying "Rochester Police Department - 6/20/75," which was introduced into evidence. Objection was made to both of these and a mistrial was asked for as a result of the introduction of the latter.

Defendant asked for and was denied the raw notes made by Agents Foley and Kane at the time of their interrogation with him and a motion to strike their testimony, based upon the fact that their notes might have contained exculpatory materials, was denied.

The defendant offered no proof and after the court's charge, the jury came back for further instructions and testimony relating to the general question as to how the defendant had been identified. After deliberating further, they came back in and

asked that the testimony of Ms. Vickers be re-read. Within fifteen minutes after hearing the testimony of Ms. Vickers, the jury arrived at their verdict of guilty on the charge of bank robbery and the charge of armed bank robbery. The charge of conspiracy had been dismissed by the court at the conclusion of the government's case.

On November 22, 1976, appellant was sentenced to a term of imprisonment for fifteen years. The sentence was to be served consecutively, after Mr. Bryant served his sentence of 28 years meted to him on April 16, 1976, as a result of a bank robbery committed in the Southern District of Ohio. A petition, pursuant to Rule 35 F.R.C.P., to run these two sentences concurrently was denied.

POINT I

ALL THE EYEWITNESS IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED

1. THE EYEWITNESS IDENTIFICATION BY DONNA VICKERS WAS THE RESULT OF IMPROPER IDENTIFICATION PROCEDURES AND CREATED SUBSTANTIAL LIKLIHOOD OF IRREPARABLE MISIDENTIFICATION

Donna Vickers eyewitness identification was critical to the government's case. Based upon the questions which the jury asked, it appears that no other fact was more compelling or more important to the government than that.

It is the defendant's contention that Miss Vickers never formed an accurate impression as to whom she had seen; that his due process right was violated by an identification which was so impermissibly suggestive that it gave rise to a very substantial liklihood of irreparable misidentification; see in this matter Simmons v. U.S., 390 U.S. 377, 384 (1968).

Although Miss Vickers was able to make an in-court identification, it is submitted that the due process tests mandated by this court in U.S. -vs- Casscles, 489 F 2d 20 (CA 2 1973) were violated.

The inquiry suggested there is two pronged. The court must ask itself first if the identification process is impermissibly suggestive. If the answer to that question is affirmative, then the court must ask itself if other than the totality of the circumstances that there was a tendency to give rise to the substantial liklihood of irreparable misidentification such as would show that defendant's rights had been violated, U.S. -vs- Casscles, supra, 489 F 2d 20, 23.

With respect to the first test, it is undisputed that on June 25, 1975, she was at a preliminary hearing conducted by the Monroe County District Attorney. She was asked if she could identify anyone in the court room and she said that to the best of her knowledge that she could not.

Subsequently, Miss Vickers was taken, some three months later, to a Monroe County Grand Jury and at

that time, she was shown a wallet-size photograph, not a mug shot, and she said:

> They showed me a picture and said it was taken the night he was arrested and could I identify the picture as being the man who approached me during the robbery, and when he showed it to me I just went, "Oh, my God, that is him."
>
> (P178F23)

Showing a witness only one mug shot photograph of an individual is impermissibly suggestive: U.S. -vs- Casscles, supra, U.S. ex rel Gonzalez v. Zelker, 477 F 2d 797 (CA 2 1973).

There were no extraordinary circumstances which justified the one photograph show up. There is no proof that the District Attorney's Office of Monroe County attempted to use any other eyewitness identification procedures and there was no evidence showing why this procedure was done.

To further compound the misidentification, Mrs. Vickers was shown a spread of mug shot photographs which the court now has in front of it. There are two types of photographs, one with three views of a suspect and

one with two views. The picture of Mr. Bryant is one of only two other pictures that contain three views. Further, Mr. Bryant's picture is the only one which carries the placard "June 20, 1975," the day of the bank robbery.

Further, after being shown those photos, on November 9, 1976, Ms. Vickers was seated in court waiting for her turn to testify. She freely admitted that during that time that she was waiting that she had an opportunity to observe Mr. Bryant, seated at the counsel table. (P206F10 et. seq.). This case is more aggravated than either U.S. v. Casscles, supra, or U.S. ex rel Gonzalez v. Zelker, supra.

With respect to the second test, the totality of the circumstances were such that it was error not to suppress the eyewitness identification.

The bank robbery occurred during the daytime. The witness stated that the man, whom she identified as Mr. Bryant, first caught her attention when she became aware of a loud noise signaling the presence of the man, whom she identified as Mr. Bryant, leaping over one of the teller cages. She said that he came towards her, grabbed one of her legs, causing her

to hop some thirty to thirty-five feet.

She testified that from the time that this individual leaped over the counter, until the time that he finished taking her to where she finally stopped hopping was approximately sixty to ninety seconds. (P192F5).

Although she said she was watching his face, giving the impression that her attention was directed solely to it, she indicated that the person was carrying a handgun and she looked at it. He was crouched down and he was wearing sunglasses. Miss Vickers then testified that she became aware of another bank robber and she gave a brief description as to his features (P201F17). She indicated that during this period of time that she was concerned about the handgun, whether it was levelled at her and whether it was going to go off (P207).

She indicated that she could not, because of the tinted glasses, see the color of the person's eyes, his eyebrows, the facial muscles within his eye socket and she further testified that her attention was directed to the glasses and to the hair on

his face as contrasted with other facial features. (P209).

Ms. Vickers, after the bank robbery, gave a description to the F.B.I. in which she described the individual who robbed her was a man twenty-eight to thirty years of age, 5'6" to 5'8", weighing 140 pounds with a medium bush haircut and unshaven. (P192-193).

At the trial and at the hearing, she suddenly remembered that she had given the F.B.I. Agents other descriptive features of the defendant strikingly different from her first description. At the trial, she said that the man who approached her was wearing a wig. "It was black and very shiny, it just seemed to be somewhat synthetic." (P332F23). "He had small features, small facial features." (P336F11). "He had hair on his face." (P183F12).

These were different descriptions than she had given the F.B.I. The latter item was a misdescription (She had told the F.B.I. that her assailant was unshaven). The former two items were brand new and were being remembered and recollected for the

very first time.

All of this was critical because Ms. Vickers was first confused as to who the individual coming over the bank cage actually was.

First she identified the robber as one of her regular customers, Ray Reeves, (P168F4).

She indicated that he was someone that she waited on a great deal and with respect to him, she stated, "Ray is a regular customer of mine who I wait on every week. It is on a first name basis, Hi, Ray, Hi, Donna." (P331F23).

She admitted that she couldn't tell how far away she was from his as "Iam not very good with feet and things." (P167F15). When she first saw this individual, she said that she started to say, "Ray, what are you doing?" (P168F17).

When that person landed, she decided it was someone else because "He was about two feet shorter than the man I thought he was." (P168F22).

The defendant stands approximately 5'4", and this would have meant that Mr. Reeves was well over seven feet tall.

When asked to describe Mr. Reeves, Mrs. Vickers indicated that he was approximately 6'1" tall and that even though he is a regular customer, she does not recall whether he has any hair on his face. She further indicated that she has never paid any attention to his face to see if he has any hair on it. (P339F19), even though she sees that face every week.

At the preliminary hearing, conducted by the State of New York, on June 25, 1975, Mrs. Vickers indicated that she knew that she was going to testify in a case involving a man by the name of David Bryant and that she had spoken to the District Attorney in advance. She indicated that she was advised that they thought that the suspect, i.e. Mr. Bryant, was connected with the bank robbery. (P197).

At the preliminary hearing she was asked, at that particular time "Can you give me any identifying features?" (i.e. of the defendant, Mr. Bryant)(P198F15) and she said "No, he had hair on his face and sunglasses on, they were tinted glasses, they weren't really dark." (P199F1). She testified that there came a time when she looked at Mr. Bryant, who was

present at the preliminary hearing and that she could not identify him. (P199).

The description of the wig became significant, because the first time that it appeared in the case was at the identification hearing held immediately prior to trial. This proved critical, as the jury wanted to know where the wig was and what had happened to it. If the witness had recollected a wig, at the time that she was interviewed by the F.B.I., immediately after the bank robbery, it would seem more likely that she would remember it then. The additional description which she gave, including the small facial features, is classical in terms of the ability of the mind to make the situation fit the facts.

Mrs. Vickers had an opportunity to view Mr. Bryant prior to the identification hearing as she was seated in the court room waiting to give her testimony. She had ample opportunity to stare at him and to then to describe the "small facial features." In U.S. -vs- Casscles, supra, and U.S. ex rel Gonzalez v. Zelker, supra, this court pointed out the several factors that

were significant in an eyewitness identification.

(1) How well was the crime scene lit?

(2) How close was the defendant to the observer?

(3) Was the observer a victim or a bystander?

(4) Could the victim look at the assailant's face?

(5) How accurate was her description of her assailant? (See also in this respect Neil v. Biggers, 409 U.S. 188, (1973).

(6) Did the eyewitness show any uncertainty as to her identification?

(7) Did the observer have any clear recollection of the photographic identification procedures?

(8) Are there any other factors linking the defendant to the crime?

The crime scene was well lit and the person who assailed Mrs. Vickers was close to her. However, Mrs. Vickers was victim and she could not see all of her assailant's face. The sunglasses covered up a sufficient portion of the active facial muscles so that it would be difficult for her to be able to give an accurate description.

Her description was inaccurate. She described one of her customers. Subsequently, she gave varying descriptions for the same man.

Most critically, she had an opportunity to confront Mr. Bryant within a week of the bank robbery. Under oath, she could not identify Mr. Bryant as being the bank robber. She had discussed the matter with the Monroe County District Attorney and she knew the purpose for her being in court.

The first time that she was able to identify Mr. Bryant was when she saw a photograph of him at the Grand Jury conducted by the County of Monroe. She had a vivid recollection of that photographic process; it appeared as though she was electrified by what she saw, "Oh my God, it's him." Her recollection is not of a man who entered a bank and robbed her, but of the picture of David Bryant that was shown to her at the Monroe County Grand Jury.

The questions that the jury perpended after first entering deliberation are as follows: "One witness said she thought he had a wig. Was a wig ever found?" "How much weight has David Bryant

lost since he has been under arrest?" There was a second note which also delivered to the court which inquired "Did anyone ever find a black wig in the possession of the defendant?" (P406).

The last question which the jury asked prior to coming in with their verdict was:

> Pertaining to Donna Vickers testimony concerning the man approaching her crouched down, did she say that the man that approached her had dark clothing, and if that man was the defendant?
>
> (P414).

The evidence on the case is less than overwhelming, especially in view of the other items which are discussed subsequently.

In Brathwaite v. Manson, 527 F 2d 363 (1975), this court concluded that an identification unnecessarily obtained by impermissibly suggestive means must be excluded:

> No rules less stringent than these, can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification.
>
> 527 F 2nd 363, 371.

The error pertained to defendant's due process rights, was constitutional in nature and ought to serve as the basis for reversal. In view of the fact that the proof was not overwhelming, it cannot be said, by any standard, that the error was not harmless, beyond a reasonable doubt as it was this identification which the jury used as the basis for making its guilty verdict: Chapman v. California, 386 U.S. 18 (1967).

2. IDENTIFICATIONS LIKE GWENDOLYN WALTERS AND STELLA BYNOE WERE IMPERMISSIBLY SUGGESTIVE.

Although Ms. Walters made an in-court identification of David Bryant, she indicated that she did not know the defendant as David Bryant but knew him as Randy Johnson. She indicated that in September, 1975, that an F.B.I. Agent had approached her with approximately three to ten photographs, some of which were taken by the bank surveillance photographs on the day of the robbery.

Ms. Walters testified, with respect to her interview with the F.B.I. Agent that:

> Q. And he showed you these photographs and asked you who they were, did he not?
>
> A. Yes.
>
> Q. And he also suggested some names to you, did he not?
>
> A. Well, yes and no.
>
> Q. When he came to the photograph of Randy Johnson, he said to you "This is David Bryant," did he not?
>
> A. He told me it was David Bryant, yes.
>
> Q. He told this to you as you were looking at it, weren't you?
>
> A. After I told him it was Randy Johnson.

Q. I see. So he is the one who told you it was David Bryant, correct?

A. Correct.

Q. So that without the F.B.I. telling you that at that particular time, you wouldn't have known the name David Bryant?

A. Right.

(P124F2,F17).

Mrs. Bynoe was shown government's trial exhibit number 5 at the suppression hearing and she indicated that she did not identify the individual in that picture as it was never shown to her. (11-1-76 P54F1). She said that she saw a photograph that was similar to that exhibit but not that one.

She looked at the appellant, identified him as Randy Johnson and said that the person whose picture she saw leaping over the teller's cage looked the same as him.

The government produced F.B.I. Agent Jacobson who testified that he had shown exhibit five to Stella Bynoe and that she had identified this individual as "David Bryant, ...a friend of her brothers Sonny." (11-1-76 P66F7).

Stella Bynoe testified that she had never mentioned the name of David Bryant as she only knew the individual who she said she had seen as "Randy" not by any other name. At trial, Mrs. Bynoe insisted in stating that exhibit five had not been shown to her by Mr. Jacobson and that the first time that she had seen the photograph was recently. At the trial she testified as follows:

> Q. You testified that the picture that you saw of the man be identified as Randy Johnson, you saw his back, is that correct?
> A. Yes.
> Q. And from that, from looking at his back you were able to tell that this was Randy Johnson, is that correct?
> A. Yes.
>
> (P118-119).

All of this is critical because Douglas Quinn, the person whom the government relied upon to originally provide the source of the identification testified at the suppression hearing, under the government's direct case:

> Q. As who?
> A. I said this looks like a few people, that it looked most likely to be David Bryant.

Q. Are you saying that you did not tell him positively that was David Bryant that day?
A. I never positively identified them, I said they looked to me like David Bryant and Elisha Abrams and Harold Alexander.

(11-1-76 P48).

At trial, Douglas Quinn was unable to more positively identify the defendant. Although the prosecution produced a statement, prepared by the F.B.I. which was purported to be a more positive identification of the defendant, the witness was less positive at trial.

Mr. Quinn testified at the same preliminary hearing as M s. Vickers and at that time he was asked if the photograph looked like somebody else and he replied that in fact, the photograph could "pass for somebody else...for me, my brother, and a number of other people."

Q. Are you prepared to say then today that you positively identify David Bryant?
A. Today, tomorrow, never, no, I'm not.

(P75-P76).

Under the tested enunciated by Simmons -vs- U.S., supra, it is respectfully submitted that Mr. Bryant was denied due process because of the fact that the identification procedures were so impermissibly suggestive as to give rise to a very substantial liklihood of irreparable misidentification. The F.B.I. testimony is not at all clear or convincing as to how they obtained the identification and what suggestive techniques were used. There is no proof that Randy Johnson does not exist and no proof that Mr. Bryant was not the victim of irreparable misidentification.

Once Agent Jacobson knew that Ms. Bynoe and Ms. Walters had identified a man by the name of Randy Johnson, he whould have obtained a description, from them, of Randy Johnson. He should have learned where Randy Johnson lived and every other detail about him which would have given him more positive identification. At some point, a photographic show up or possibly even a line-up could have been arranged and at that point, the question of identification could have been more properly resolved.

POINT II

MR. BRYANT'S STATEMENT SHOULD HAVE BEEN SUPPRESSED

3. THE STATEMENT WAS TAKEN IN VIOLATION OF HIS FIFTH AMENDMENT RIGHTS, HIS RIGHTS UNDER 18 U.S.C. 3501.

F.B.I. Agents Foley and Kane knew, when they had interviewed Mr. Bryant on June 23, 1975, that he had been previously interviewed, twice, on June 20, 1975. At that time, he had told the F.B.I. Agents that he did not want to make a statement until he had talked with his lawyer. It is undisputed that on June 23, 1975, no effort was made to find out whether Mr. Bryant had talked with his attorney.

It is undisputed that on June 23, 1975, Mr. Bryant was incarcerated in the Monroe County Jail, that he had been there since June 20, 1975. The Monroe County District Attorney had already filed a formal charge of armed robbery against him and the United States Government was about to charge him with

bank robbery.

Agent Foley testified that Mr. Bryant was given an advice of rights form and was asked to read it and sign it.

Mr. Bryant refused to sign the form and Agent Foley asked him in a perfunctory way if he understood the form.

Mr. Bryant was continually incarcerated from June 20, 1975 and was not taken to the United States Magistrate until one month later, July 25, 1975. The United States Magistrate's Office is approximately three blocks from the Monroe County Jail and there was never any excuse offered for the delay in arraigning Mr. Bryant.

18 U.S.C. 3501 prescribes the formula for testing the voluntariness of any "self-incriminating statement" given by Mr. Bryant. In view of the fact that Mr. Bryant did not take the stand, the exculpatory statement would have to be held against him by virtue of his failure to produce the alibi witnesses.

In looking at the factors in 3501 (B), it is respectfully submitted the trial court made an in-

correct determination in admitting the statements.

The defendant was arrested on June 20, 1975 at approximately 5:30 P. M. and the statements were made some sixty hours later. It is unknown, and the government did not prove what knowledge the defendant had on June 20, 1975 as to his involvement or implication in the bank robbery. The government did not prove that the defendant was advised of his constitutional rights on June 20, 1975, although it was established that Mr. Bryant had indicated that he would not give a statement until he had consulted with his attorney.

It is obvious that Mr. Bryant was without the assistance of counsel when questioned and when giving his statement.

18 U.S.C. 3501 (C) permits a delay in bringing the defendant to the United States Magistrate if such confession "was made or given by such person within six hours immediately following his arrest or other detention."

The delay in arraigning Mr. Bryant, in effect, amounted to his not being arraigned at all. The

confession did not follow six hours upon his "other detention," (18 U.S.C. 3501 (C)) and was illegal.

There is no proof offered as to why Mr. Bryant was not arraigned on June 20, June 21, June 22, 1975. There is no showing that the U.S. Magistrate was unavailable.

Additionally, based upon Agent Foley's statement, it appears that the government had more than probable cause to arrest Mr. Bryant, without a warrant, based upon its knowledge of the investigation which has been conducted by the Rochester Police Department. Agent Jacobson's complaint was based upon the statements made by Douglas Quinn in his purported identification of Mr. Bryant. That information was all known to the Rochester Police Department on June 20, 1975 and presumably to the F.B.I. on that same date in view of the conversations which they had had with Mr. Bryant.

It appears that the F.B.I. was delaying a trip to the United States Magistrate as long as possible in order to be able to obtain some statement from Mr. Bryant.

There is no showing that the delay was caused or resulted from routine processing, see e.g. U.S. v. Barbera, 486 F 2d 333 (CA 2 1973) cert. den. 416 U.S. 940 (1974).

The time gap resulted from either an inexcusable failure on the part of the F.B.I. to arraign the defendant or more from a more sinister motive to keep him in jail until such time as they had a statement from him. This was never satisfactorily explained by the government as no reason was ever given.

In U.S. v. James, 493 F 2d 323 (CA 2 1974) cert. den. 419 U.S. 849, defendant had asked for counsel prior to going before a grand jury proceeding. The United States Attorney conducting the proceeding advised him that he should go ahead with the proceeding anyway and if he wanted counsel, that he could interupt the proceedings at any time and ask for it.

This Court concluded that once Mr. James had asked for counsel, his subsequent statements did not waive it:

> Once he asked for and stated his desire to consult with counsel all questions should have ceased until he was assigned counsel and given an opportunity for full consultation.
>
> U.S. v. James, 493 F 2d 323, 325.

That decision was based upon the same language found in Miranda v. Arizona, 384 U.S. 436, 474 (1966).

The procedural posture of this case is entirely different from that of Mr. James. Objection was made to the statement and the court was asked to suppress it.

The government did not produce the F.B.I. Agents who interviewed Mr. Bryant, prior to the day that he gave the statement to Agent Foley. However, it is respectfully submitted that the knowledge of those two agents must be charged to Agent Foley and the government, especially in view of the fact that Mr. Bryant never signed the waiver of rights form and Agent Foley never explained, orally, Mr. Bryant's right to it. The government, on Agent Foley's testimony, has not shown that Mr.

Bryant ever waived his right to counsel; see in this matter U.S. v. Womack, 542 F 2d 1047 (CA 9 1976).

In view of the fact that the scope of the interrogation was always directed towards the robbery, and towards no other crime, the renewed interrogation cannot be held to be constitutionally permissible as was the case in Michigan v. Moseley, 423 U.S. 96 (1975).

All of this bears heavily on the admissibility of Mr. Bryant's exculpatory statement.

In U.S. -vs- Marrero, 450 F 2d 373 (CA 2 1971), this court was faced with a twenty-eight hour delay from arrest to arraignment. This court noted, in affirming the conviction, that the issue of time was first raised on appeal. There was no finding that a commissioner was available and there was no showing of constant or systematic interrogation.

In U.S. v. Ortega, 471 F 2d 1350 (CA 2 1972), this court was faced with a delay of thirty-seven hours. In that case, the court also affirmed the conviction, refused to overturn its ruling in Marrero, supra, and found no particular fault with the proceedings below.

In the instant case, the court is confronted with a delay of a month. It is confronted with three separate interrogations. In view of the 2-1/2 day delay between the first interrogations and the second, Mr. Bryant may well have concluded that he really had no right to an attorney after all and that his request to consult with his, or some attorney, would never be honored and that he would stay in jail continuously until he told the F.B.I. what they wanted to hear. Mr. Bryant was continuously incarcerated from the day of his arrest until his arraignment in July. There was no attenuation and the exculpatory statement was improperly received and should have been suppressed below.

POINT III

OTHER ERRORS COMMITTED AT TRIAL DENIED MR. BRYANT DUE PROCESS

4. MR. BRYANT'S MUG SHOT.

Exhibit #38, a mug shot of Mr. Bryant was introduced into evidence. Although a mistrial was demanded, the court refused to grant one.

Immediately prior to the introduction of this exhibit, the government had elicited the testimony of Judy Tripp, who testified that she worked for the Rochester Police Department. She testified, over objection, that she was employed in the "Criminal Records Division" (P317F20).

The court gave the jury a precautionary instruction with respect to that but it was not sufficient.

Miss Tripp testified that the records division "[kept] records of all people who are arrested." (P319F3). She brought a Bertillon folder to court, identified it as such and stated that Mr. Bryant

has been assigned a Bertillon number, 58169, and she was then asked to compare Exhibit 38 with a similar mug shot which she had in her file.

The mug shot was in exactly the form criticized by Judge Leventhal, in the case of Barnes v. United States, 365 F 2d 509 (C.A.D.C. 1966). It had two views of Mr. Bryant and it is before you to examine. No effort was made to alter this mug shot in any way.

The government did not use this exhibit when it directly examined Donna Vickers, at trial. It attempted to use it on redirect examination after her credibility had been attacked. The jury had no precautionary instruction with respect to that photograph (Indeed, it is respectfully submitted that no precautionary instruction would have cured the due process violation). Since the photograph was taken at the time of the defendant's arrest, and may very well have been similar to one which was shown to Ms. Vickers at the preliminary hearing (although there was no proof on this); its use was highly prejudicial.

In the case of U.S. v. Harrington, 490 F 2d 487 (1973), this court said, with respect to this evidence:

> We perceive three prerequisites to a ruling that the introduction of "mug shot" type photographs does not result in reversable error.
>
> U.S. v. Harrington, 490 F 2d 487, 494.

The government must have a demonstrable need to introduce the photographs. In the instant case, there was no such need. It was not shown that these photographs were free from the tainted grand jury, one photograph show up previously complained of.

The mug shot implied that Mr. Bryant had a prior criminal record. The way the mug shot was put together showing the placard with the date of the crime itself, together with the prior testimony of Miss Tripp had to lead the jury to the conclusion that the defendant was in fact a criminal.

The introduction of the mug shot at trial drew attention to its source, the implication of the mug shot was that Mr. Bryant was a criminal.

This case is similar to U.S. v. Harrington, supra and is to be differentiated from the U.S. v. Calarco, 424 F 2d 657 (CA 2 1970) cert. den., 400 U.S. 824 (1970). In that case, the photographs were not used to boot strap, buttress and improperly bolster illegal identification testimony.

In view of the other errors complained of, and the proof which is not overwhelming, it cannot be said that this error was harmless beyond a reasonable doubt.

5. OTHER PHOTOGRAPHS OF MR. BRYANT WERE IMPROPERLY INTRODUCED

Three days before the events of June 20, David Bryant, had been a guest panelist on a television program. The government introduced from that television tape, which was never shown to the public, two 8 x 12 glossy photographs, exhibits #35 and #36, of the defendant, David Bryant.

The introduction of these photographs was objected to on the grounds that they were irrelevant at the very least or at the very worst highly prejudicial to the defendant.

The issue which the jury had to decide was whether Donna Vickers' testimony as to her identification of the defendant could be believed. The use of the photographs from the television tape were unnecessary and created an inference of guilt, i.e., the government had a better case against Mr.

Bryant than it actually did.

How Mr. Bryant looked before the bank robbery is not the issue that the jury had to decide. In combination with the mug shot photograph, it gave the jury the overwhelming impression that Mr. Bryant's identification had always been known. These photographs were used to illegally boot strap and otherwise improper identification. Significantly, Ms. Vickers was not asked to identify these photographs in any way.

6. THE FAILURE OF THE F.B.I. TO PRESERVE ITS NOTES DENIED MR. BRYANT DUE PROCESS.

Agent Foley, testified that he had made notes of his conversation with Mr. Bryant. He, as well as every other F.B.I. Agent in the case, it being standard F.B.I. policy to do so, in the Western District of New York, destroyed them after his form 302 was prepared.

By destroying these notes, Mr. Bryant was denied material made available by 18 U.S.C. 3500 as well as material which may have exculpated him in accordance with Brady v. Maryland, 373 U.S. 83 (1963).

Although not asked for (Indeed Agent Carney would not have had them,) the notes pertaining to Ms. Vickers' identification of Mr. Bryant would have been extremely useful under the doctrine of Brady v. Maryland, supra, and perhaps 18 U.S.C. 3500.

This court has previously considered the Jenks, material argument and has rejected it:

U.S. v. Covello, 410 F 2d 536 (CA 2 1969) cert. den. 396 U.S. 879 (1969); and U.S. v. Crisona, 416 F 2d 107 (CA 2 1969).

No claim is made, in the instant case, that these notes were destroyed for improper purposes. However, if these notes were available, the court could certainly examine them, in camera, and determine if they might be available as Jenks, material or as Brady, supra material.

No additional burden is placed upon the F.B.I. by requiring them to keep these raw notes. In the instant case, as Brady material, they would have been invaluable. There may have been other factors dealing with Miss Bynoe and Miss Walters identification of Randy Johnson, Mr. Bryant's statement or Ms. Vickers identification, which to an F.B.I. Agent might be totally insignificant but could be significant in terms of the defense analysis of the case.

In U.S. v. Harrison, 524 F 2d 421 (CADC 1975), the court held that it would not impose sanctions against the United States Government, in a similar

situation, as the defendant there had an opportunity to view the rough interview notes taken by the District of Columbia Police within minutes of the F.B.I. interview.

That court commented though:

> ...It is the court, not the investigator, who must make the judgment as to what evidence is discoverable and therefore must be preserved.
>
> 524 F 2d 421, 432.

That court commented that without the interview notes it is impossible to effectively cross-examine an agent as to any discrepancy in his form 302 as there is no way that one can elicit testimony that would cast doubt on the accuracy of the 302 report and cross-examination itself would not be helpful.

This issue was resolved in the case of U.S.A. -vs- John Michael Harris, a 9th Circuit ___F 2d ___ decision (#76-1317) decided September 23, 1976. The court concluded, that in that case, that the failure to preserve the notes effected no substantial

right of Mr. Harris. They concluded however that thereafter, the F.B.I. must preserve the original notes taken by its agents during interviews with prospective government witnesses or with an accused.

In the instant case, the proof was not overwhelming. The eyewitness testimony of Ms. Vickers was confused. Ms. Bynoe and Ms. Walters did not know the defendant as Randy Johnson and they supplied no descriptions of him to the F.B.I. Mr. Bryant's statements were orally taken by the F.B.I.

Agent Carney was responsible for receiving the eyewitness identification of Ms. Vickers. Agent Jacobson received the eyewitness identification from Ms. Bynoe and Ms. Walters. Agents Kane and Foley received Mr. Bryant's exculpatory statement. Other agents interrogated Mr. Bryant at the jail.

Each of the agents reached the conclusion that Mr. Bryant was implicated. In the process of deductive logic, they found those facts which would support that conclusion.

It would have been helpful, to look at the notes to determine what other identifying features Donna Vickers gave. It would have been invaluable to find out what other things were said by Mr. Bryant, as in the space of twenty or thirty minutes he had to say more than the exculpatory statement which he gave. It would have been helpful to know what effort Agent Jacobson made to locate Randy Johnson.

POINT IV

SENTENCE WAS EXCESSIVE

7. MR. BRYANT'S FIFTEEN YEAR SENTENCE.

This court has indicated that it would not interfere with the sentencing prerogative of judges. The fifteen year sentence was within the range which the court could have given. It is respectfully submitted that the fifteen year sentence, on top of another twenty-eight year sentence is excessive in view of the fact that the defendant is in his mid-twenties.

It is respectfully submitted that there is no consistency with respect to sentencing policy in this or any other circuit. Had Mr. Bryant been sentenced by any other of the forty-three district judges, this court would have had a wide range of results.

While a convicted bank robber knows that he has to face jail, he at least likes to feel that he will

be treated similarily to those individuals who have committed the same act under the same circumstances.

The wide disparity in Mr. Bryant's sentence, with respect to all other bank robbers, or even with respect to his co-defendant, has amounted to a cruel and unusual punishment.

Although it is not before this court, there is no proof that Mr. Bryant's involvement was any more severe than his co-defendants. Although it is not before this court, there is no reason why there had to be such a vast gulf between his fifteen year sentence and the two and one-half years meted to a co-defendant.

It is respectfully urged, that this court, if it do no other thing, remand the matter back to the District Court to obtain full particulars with respect to the involvement of other co-defendants in this case and with the sentences meted to them.

This court, in the interest of justice, is asked to look at the virtual lottery that takes place once a defendant finally stands before a court for sentencing. It is ironic that all of the procedural protections which accompanies defendant from the moment he is arrested until the moment his conviction is finally affirmed are stripped from him as he waits his sentence.

Theoretically, Mr. Bryant could have objected to every single word of testimony uttered by every witness in the court below and this court would be duty bound to examine each and every sentence, word, and preposition to determine if its utterance denied the defendant of due process. Yet, in the thing which ultimately matters most to the defendant, how much time he will have to serve, there is no appeal.

POINT V

THE DECISION OF THE LOWER COURT SHOULD BE REVERSED AND A NEW TRIAL ORDERED AND A HEARING SHOULD BE ORDERED INTO THE LENGTH OF DEFENDANT'S SENTENCE, AS CONTRASTED WITH HIS CO-DEFENDANTS, AS CONTRASTED WITH OTHER BANK ROBBERS' SENTENCES.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

-vs- AFFIDAVIT OF SERVICE

CR 76-1567

DAVID BRYANT,

Defendant-Appellant.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

On February 22, 1977, the undersigned served GERALD J. HOULIHAN, Assistant United States Attorney for the Western District of New York with a copy of a brief and appendix in the above appeal.

s/ Alfred P. Kremer
Alfred P. Kremer

Sworn to before me this
22nd day of February, 1977.

s/ DONNA C. BROWN
Notary Public in the State of New York
MONROE COUNTY, N. Y.
Commission Expires March 30, 19 78

Index No. Year 19

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-vs-

DAVID BRYANT,

Defendant-Appellant.

COPY

AFFIDAVIT OF SERVICE

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To

Attorney(s) for

Service of a copy of the within is hereby admitted.

Dated,

.....

Attorney(s) for

Sir:— Please take notice

NOTICE OF ENTRY

that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

NOTICE OF SETTLEMENT

that an order of which the within is a true copy will be presented for
settlement to the HON. one of the judges
of the within named court, at
on 19 at M.

Dated,

Yours, etc.

ALFRED P. KREMER

Attorney for

Office and Post Office Address
200 Times Square Building
ROCHESTER, NEW YORK 14614

To

Attorney(s) for

STATE OF NEW YORK, COUNTY OF MONROE

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within
have has been compared with the original and found to be a true and complete copy.

Dated:

.....

Alfred P. Kremer